Supreme Court, U.S.
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No. 01 331

In The

Supreme Court of the United States

JO ANN G. JACKES, Petitioner

v.

BILL HARBERT INTN'L CONST. INC.,
Respondent

On Petition for a Writ Of Certiorari
To The United States Court
of Appeals for the Eleventh District

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION

Whether the U. S. District Court of Appeals for the Eleventh District erred in affirming Summary Judgement granted by the District Court for the Northern District of Alabama, based on the U. S. Magistrate Judge's recommendation to the District Judge containing incorrect statements, incomplete discovery, and omitted evidence proving that the defendant falsified affidavits and responses to the EEOC and to the United States District Court for the Northern District of Alabama in order to escape trial by summary judgement.

PARTIES TO THE PROCEEDING

The petitioner in the case, Jo Ann G. Jackes, is a private individual. The respondent in the case, Bill Harbert International Construction Company, Inc., is a corporation, incorporated in the state of Delaware

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceeding	ii
Table Of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutes And Regulations Involved	2
Statement Of The Case	2
Reasons for granting the writ:	10

I. The Civil Right Act of 1964, 42 U.S.C.§2000e et seq., as amended by the Civil Rights Act of 1991, makes it illegal for employers to discriminate against individuals on the basis of race, color, religion, sex, or national origin. Since expanded it prohibits against discrimination against other groups, such as pregnant women, persons

TABLE OF CONTENTS - Cont'd

Reason for granting writ - Cont'd.

over 40, and the disabled.

A. The Magistrate Judge's recommendation to the District Judge to grant summary judgement based on his conclusion that plaintiff was not qualified as she did not have an engineering degree; that BHIC's replacement of one permanent female employee with a younger less experienced male was justifiable downsizing; and that the plaintiff failed to make out a *prima facie* case of discrimination based on BHIC's explanations and not factual evidence.

II. The Eleventh Circuit has cautioned: Summary Judgement is such a lethal weapon, depriving a litigant of a trial on the issue, caution must be used to ensure only those cases devoid of any need for factual determinations are disposed of by summary judgement.

TABLE OF CONTENTS - Cont'd.

Reason for granting writ - Cont'd.

A. The Magistrate Judge's recommendation to the District Judge in support of BHIC's request for summary judgement based on incorrect information supplied by BHIC.

B. The fact that petitioner's case was greatly damaged, through no fault of her own, by the "disappearance" of her attorney, Carol A. Rassmusen, at the summary judgement stage.

C. Summary judgement was granted without the completion of discovery.

Conclusion 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Sonnetheil v. Christian Moerlein Brewing Co.,172 U.S. 401, 408 (1899) 9

STATE CASES:

Williams v. Vitro Services, *Inc.* 144 F.ed 1438, (11th Circuit) 4

STATUTES

Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991 10

PETITION FOR A WRIT OF CERTIORARI

Jo Ann G. Jackes respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh District.

OPINIONS BELOW

The report and recommendation of the Undersigned Magistrate Judge is reprinted at Appendix.1., Jo Ann G. Jackes v. Bill Harbert International Construction Co., Inc., No. CV-97-HGD-3264-S

The Final Judgement of the United States District Court of the Northern District of Alabama is reprinted at Appendix. 39. No. CV 97-P 3264-S

The Final Judgement of the United States Court of Appeals is reprinted Appendix 42.

JURISDICTION

The order of the United States Court of Appeals for the Eleventh District was entered on February 2, 2001. This Court's Jurisdiction is invoked under 42 U.S.C. § 2000e et seq.

STATUTES AND REGULATIONS INVOLVED

Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991.

STATEMENT OF THE CASE

Plaintiff was terminated by Bill Harbert International Construction Company, Inc. (BHIC), June 28, 1996, the day that she had became 100% vested in the company's 401k plan. Reason given plaintiff by the newly appointed Executive Vice President, Ed McSweeney at the time of the termination was "downsizing, due to a shortage of work." The plaintiff, a forty five year old female, was advised at that time by McSweeney that Lamar Phillips, a forty year old male hired three months prior, would be taking over her duties as estimator.

BHIC has continuously defended the termination action by offering the explanation that Phillips was hired as a senior estimator, and more qualified than the plaintiff because he held a degree in building science. The educational requirements for a senior estimator are a 4 year engineering degree or equivalent combinations of technical training and/or related experience. The plaintiff had 29 years of related construction experience at the time of her termination. Also included in the requirements are a thorough knowledge of company procedures, estimating techniques, all engineering disciplines, cost control

systems and accounts required. The ability to estimate all type of projects/contracts, plus the ability to coordinate and supervise group work effort is essential. The plaintiff had these qualifications, and had performed them under the direction of Randy Basham following the resignation of David Robbins. The BHIC also denies that Phillips, a friend and ex-coworker of Billy Harbert, Jr., was lacking in these qualifications and had to be sent for training by BHIC. (Phillips Depo. at 39). This was special training for the estimating system in use at BHIC, that the plaintiff already been trained for and had been using for over four years prior to her termination.

When McSweeney was questioned during deposition as to how he made his determination to terminate the plaintiff, and whether or not he looked over the plaintiff's work record including appraisals prior to making his decision to terminate her since he was new to his position, his response was "Why should I" . (McSweeney depo.pg.57) McSweeney also testified that he did not know what projects plaintiff was working on, and was not sure whom she reported to.

Not only did Phillips not have the required clearance, BHIC's own documents and Phillips testimony (Phillips Depo. at 17 - 21, 34-35, 42 -43) show that Phillips was already working on a highly classified Federal Building proposal that plaintiff had been denied work on even though she held the proper government clearance to do so.(Plaintiff's exhibit #3) Phillips did not receive proper clearance until October 14, 1997. (Plaintiff's exhibit #1)

In *Williams v. Vitro Services, Inc.* 144 F.ed 1438, the 11 th Circuit concluded:

> [O]ur case law expressly holds that, where a plaintiff contends that his position has been consolidated or reassigned to other employees, as has been alleged in this case, he may establish a *prima facie* case by demonstrating that he was qualified for his current position *or* to assume another position at the time of discharge, *see Benson,* 113 F.3d at 1208; these elements are plainly phrased in the disjunctive, and failure to show qualification for both the current job and a second, vacant position is not fatal to the plaintiff's prima facie case.

BHIC had also hired two other younger male estimators just prior to terminating the plaintiff, Ricky Adalphe (forty year old white male) and William Hereford (twenty five year old white male, with no estimating experience, hired 3/13/96). Hereford was assigned to a local job-site and then transferred to BHIC's corporate office as an estimator June 28, 1996, the day plaintiff was terminated. (Plaintiff's Exhibit #3) In the affidavit of Jim Rein, Vice President of Domestic operations, stated that Adaphe and Hereford were hired to work in the domestic division. Phillips testimony was that Hereford was working as an estimator in the International Division, the division the plaintiff had been terminated from. (Phillips Depo at 34).

Plaintiff filed a timely charge with the EEOC, basing claim on sex and age discrimination. The

defendant's reply to this charge (Plaintiff's Exhibit #6) held false information regarding listed female's positions and titles. John Vines, defendant's Human Resource Manager, admitted under oath during deposition that the information used to fill out the response to the EEOC was gained from Ed McSweeney and Alan Hall (CFO). (Vines depo.pgs.25,26)

Defendant's only downsizing consisted of the termination of the plaintiff. (Vines depo. p.14) Defendant hired twenty contract estimators following the plaintiff's termination. None of which were female.(Vines depo.pgs. 56,57,58.)

Defendant's Human Resource Manager, John Vines, also testified that defendant's personnel grew from 450 employees as of June 28, 1996 to 600 employees by the end of 1996. An increase of 150 employees, all while the company was supposedly "downsizing". (Vines depo. pgs. 27,28; Plaintiff's exhibit #6)

Plaintiff had an excellent work record, with good reviews and constant company praise for cost effectiveness and company savings, but not once offered even a contract position although the defendant's employee ranks grew by 150 persons in the six months following the "lay off" of plaintiff.

Plaintiff was denied discovery of pertinent information by the magistrate judge that recommended in favor of the defendant's request for summary judgement in the District Court.

The magistrate judge cited comments from the defendants objections in his recommendation for summary judgement that portrayed the plaintiff as merely someone in charge of "furniture" that was no longer needed. The defendant, as is customary, used the Construction Standards Institute framework for estimating and discipline assignments. Of the sixteen divisions within this framework, the plaintiff's job description was the responsiblity of ten of these sixteen divisions. The claim in the defendant's affidavit that the plaintiff was only an architectural estimator in charge of furniture is an inference of the discriminatory attitude of the defendant.

The claim in the affidavit of Billy Harbert, Jr., that Phillips was not hired as structural /architectural estimator, but a replacement for David Robbins lacked credence, as David Robbins was a structural/architectural estimator.

BHIC claims that Phillips was more qualified in that he held a degree from Auburn University in Building Science, and had more years of estimating experience. Also, Phillips had worked as a project manager and supposedly published an article on scheduling. Upon deposition it was found that Phillips did not have more experience than the plaintiff, and had no experience at all in estimating international projects. It was further found the Phillips' article that had been included in the affidavit of Billy Harbert (also a graduate of Auburn, with a degree in building science) as testimony for summary judgement, that Mr. Phillips had actually used the work of several other people, combined it and had it published under his

own name without giving credit to anyone but himself. (Phillips depo. pgs.60,61,62)(plaintiff's exhibit #12)

The plaintiff was never advised that her employment was in jeopardy because she did not have an engineering degree in building science. Plaintiff had made it clear during her initial interview with Randy Basham, 6 ½ years prior, that she did not hold a degree.

The defendant's downsizing consisted of terminating a 45 year female to make way for a younger male. The Human Resource Manager admitted in deposition that plaintiff was the only downsizing.(Vines depo.pg.14)

Plaintiff was treated less than equal to her male coworkers during her employment at Bill Harbert International. Plaintiff was referred to as "Bitch" a coworker working in a supervisory position, and was excluded on numerous occasions from staff meetings and from receiving information made available to her male coworkers, and was not allowed to inspect job-sites as was her male co-workers because it involved travel overseas. Plaintiff did report harassment acts to her supervisor, Randy Basham. Mr. Basham testified that he didn't recall if he ever acted on the complaints.(Basham depo.pg.42) Basham himself made remarks regarding PMS if plaintiff worked with her door closed.

BHIC posted policies on sexual harassment and equal employment opportunity only after plaintiff filed suit with the EEOC.(plaintiff's exhibits #4,#5}

Both are dated November 14, 1996, over four month's after plaintiff's termination.

Defendant's continued defense of the male replacement of a female being better qualified in that the male replacement allegedly had experience as a project manager is pretentious and discriminatory in its self in that the position of employment in question was not that of a project manager capacity.

As has been pointed out in this case, the. defendant's affidavit should not have been taken at face value by the Magistrate Judge as the defendant's lack of credibility had already been established by the false information submitted to the EEOC regarding this case and affidavits testifying to the fact that the defendant falsified information on bid documents to the U. S. Government in the defendant's favor for the purpose of aiding the defendant in securing Federally Funded Contracts.

The Magistrate Judge took at face value the affidavit of a person with the utmost interest in the outcome of the case, Billy Harbert, Jr.

As held in Sonnetheil v. Christian Moerlein Brewing Co.,172 U.S. 401, 408 (1899), and still the law today:

> [T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question

of fact.

The Court, of course, cannot take the statements of interested witnesses for the movant at face value without making forbidden credibility choices. The opponent to summary judgement is due all reasonable inferences, one of which is that the defendant's witnesses' interest in the outcome of the case is sufficient to draw an inference against their credibility.

The recommendation of the Magistrate Judge to the District Judge contains statements regarding the affidavit of Billy Harbert, Jr., President and COO of Bill Harbert International Construction, Inc., concluding that the choice to terminate the plaintiff was nothing more than a business decision, when in fact Billy Harbert, Jr. did not hold this title at the time the plaintiff was terminated, as evidence shows, he was not listed in the BHIC organizational chart submitted in response to the EEOC.

REASONS FOR GRANTING THE WRIT

I. The Civil Right Act of 1964, 42 U.S.C.§2000e et seq., as amended by the Civil Rights Act of 1991, makes it illegal for employers to discriminate against individuals on the basis of race, color, religion, sex, or national origin. Since expanded it

prohibits against discrimination against other groups, such as pregnant women, persons over 40, and the disabled.

A. The Magistrate Judge's recommendation to the District Judge to grant summary judgement based on his conclusion that plaintiff was not qualified as she did not have an engineering degree; that BHIC's replacement of one permanent female employee with a younger less experienced male was justifiable downsizing; and that the plaintiff failed to make out a *prima facie* case based on BHIC's explanations and not factual evidence.

II. The Eleventh Circuit has cautioned: Summary Judgement is such a lethal weapon, depriving a litigant of a trial on the issue, caution must be used to ensure only those cases devoid of any need for factual determinations are disposed of by summary judgement.

A. The Magistrate Judge's recommendation to the District Judge in support of BHIC's request for summary judgement based on incorrect information

supplied by BHIC.

B. The fact that petitioner's case was greatly damaged, through no fault of her own, by the "disappearance" of her attorney, Carol A. Rassmusen, at the summary judgement stage.

C. Summary judgement was granted without the completion of discovery.

Discriminatory animus is an elusive factual question, made even more difficult by the increasing sophistication of the persons harboring the animus. Plaintiff's, who are rarely fortunate enough to have access to direct evidence, are saddled with the virtually impossible burden of proving discrimination, as in this case, when the employer only has to provide a statement to satisfy the Courts that his actions were somehow non-discriminatory. The apparent inconsistencies as to what actually defines "direct evidence" are likely to continue until the Supreme Court issues guidance regarding the burden shifting standard.

Summary judgement should never be granted without the completion of discovery.

—♦—

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should issue to the United States Court of Appeals for the Eleventh District for review of this Court of its decision below.

Respectfully submitted,

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App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JO ANN G. JACKES,

Plaintiff

vs.

BILL HARBERT INTERNATIONAL
CONSTRUCTION, INC.

Defendant

REPORT AND RECOMMENDATION

The above-entitled civil action is before the undersigned magistrate judge on the motion for summary judgement filed by Bill Harbert International Construction, Inc. (BHIC) Plaintiff Jo Ann G. Jackes, commenced this action on December 22, 1997, by filing a complaint against her former employer, BHIC. She seeks damages for various actions alleged to have been commented by the defendants in violation of Title VII (42 U.S.C. § 2000e, et seq.) and the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621, et. seq.) [Document #1]. The defendant filed a motion for summary judgement. After the consideration of this motion was stayed for a short period of time, a brief in support thereof was filed by BHIC on May 14, 1999 [Document #67], to which plaintiff has responded [Document #75]. BHIC has filed a reply to the plaintiff's motion in opposition to summary judgement [Document #77].

This matter is considered by the court pursuant to the provisions of Rule 56, Fed. R. Civ. P. Summary judgement "shall be rendered forthwith if the pleadings, depositions, answers *to interrogatories*, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Rule 56 (c) ; Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d.202 (1986). Thus, summary judgement is appropriate where the non-movant "fails to make a showing sufficient to establish the existance of an element essential to that party's case, and on which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 332, 106 S.Ct. 2548, 2532, 91 L.Ed.2d. 265 (1986). The substantive law governing the action determines whether an element is essential. Anderson 477 U.S. at 248, 106 S.Ct. at 2510. A party seeking summary judgement always bears the initial responsibility of informing the district court of the basis for its motion, identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323; see Brown v. Crawford, 906 F.2d 667, (11th Circuit 1990), cert denied, 500 U.S. 933, 111 S.Ct. 2056, 114 L.Ed.2d 461 (1991).

This circuit clearly holds that summary judgement should be entered when the moving party has sustained its burden of showing the absence of a genuine issue of material fact when all the evidence is viewed in the light most favorable to the non-moving party, Sweat v. Miller Brewing Co., 708 F.2d.655 (11th Cir.

1983); see also, Matsusita Electrical Industrial Co. v. Zenith Radio Corp.,475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252, 106 S.Ct. at 2512. The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. Id. At 255, 106 S.Ct.at 2514, citing Adickes v. S.H.Kress & Co., 398 U.S.144,158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970). It is, therefore, under this standard that the court must determine whether the plaintiff can meet her burden of coming forward with sufficient evidence as to each material element of her claim sufficient to permit a reasonable jury to find in her favor.

FACTUAL BACKGROUND

The plaintiff, Jo Ann G. Jackes, was hired by Harbert International Construction, Inc. (HIC) in January 1990. (Jackes Depo. at 24-25). In July 1992, BHIC split off from HIC. Jackes was hired by BHIC in its International Division. (Id. At 25-26,32).

BHIC is in the commercial construction business. Its International Division bids on and builds both private and United States government funded projects overseas. (McSweeney Affidavit ¶2). Jackes was employed by BHIC as a structural architectural estimator. She held this position until she was terminated on June 28, 1996. (Jackes Depo. at 32,158). Her duties included performing quantity surveys on furniture and architectural

aspects of projects and occasionally doing civil take-offs.. (Id. At 32, 213-214).

Plaintiff's formal education consists of less than one full year at Mississippi College for Women where she took some courses in accounting. (Id. At 43-44). According to her resume and her deposition testimony, her work experience involves employment with various companies since 1967. Initially, she worked as a carpenter, and later as a carpenter foreman, quality control chief and, finally as a structural estimator. She does not have an engineering background. Likewise, she has never worked as a lead estimator, lead scheduler, or project manager. (Id 52-54). Prior to her employment with HIC and BHIC, plaintiff was estimator on three jobs with her prior employer, The Daniel Company, and on two projects for W. A. Marable Company. (Id. At 51). Plaintiff states that she had very little experience as a scheduler and her training as an estimator was solely on-the-job training. (Id..52, 96-97). She testified that she did no regular estimating work until she came to work at BHIC.

On June 28, 1996, plaintiff was called into the office of Ed McSweeney, Executive Vice President of the International Division, and told she was being terminated due to downsizing and restructuring. (Jackes Depo. at 158, 195-196; McSweeney Depo. at 39-40). Plaintiff, however, claims that she was terminated because of sex and age discrimination and replaced by Lamar Phillips, an employee hired by BHIC in March 1996. At the time of her termination, plaintiff was 45 years old. (Jackes Depo. at 59). McSweeney was 41. Among the other non-clerical employees not terminated, Alf Hill was 63, David Corley was 42, Lamar Phillips was 40, and Eric Agnew was 45. (McSweeney Affidavit ¶ 10).

Analysis Of The Evidence

Discrimination and Pretext

The Plaintiff asserts in her claim of sex discrimination that she was the only female estimator in the International Division and the only "permanent" estimator whose position was eliminated. However, John Dill, a contract employee in the International Division, also was terminated in the restructuring process at the same time that she was. In her deposition, plaintiff speculates that Dill was terminated to make her termination "look better." (Jackes Depo. at 143). A review of the record reflects that plaintiff has provided no evidence regarding the number of females who have applied for work at BHIC.

Plaintiff asserts, as proof of sex discrimination, that there is evidence that Jon Green and Ed McSweeney did not want a female estimator in the International Division. However, there is no evidence that Green was involved in the decision to terminate plaintiff.

In her deposition, plaintiff states that her assertion regarding McSweeney is based on her claim that she learned from Jim Goodwin after her termination that David Marchman told him that McSweeney was looking for a male structural architectural estimator about 35 years of age.

Goodwin owns a company for whom plaintiff performed consulting work following her termination at BHIC. Marchman was a professor at the University of Southern Mississippi who worked for BHIC during the summers of 1994-1996. McSweeney has

denied that he asked Marchman to seek a structural architectural estimator of any age or gender and states that BHIC has not hired anyone as a structural architectural estimator in its International Division since plaintiff's termination. No regular employees were hired at BHIC after plaintiff's termination until January 1998 when Dustin Kennedy and Akl Charbel, both with engineering degrees, were hired as junior engineers. (McSweeney Affidavit ¶¶ 8,9).

Plaintiff also complained that Randy Basham told her in December 1995 that she "made good money for a women." (Jackes Depo. at 60). However, during the same time that Basham was her supervisor, she always received positive performance evaluations from him. Additionally, he was not involved in the decision to terminate her employment at BHIC and was not aware of it until after she had been terminated. (Basham Depo. at 22-23).

The plaintiff disputes the assertion that BHIC was downsizing as the result of lack of work. She makes numerous factual allegations which she contends support her claims of gender and age discrimination and reflect that the defendant's proffered reasons for her termination are pretextual. For instance, plaintiff makes reference to to testimony she claims shows that BHIC had plans to restructure and downsize BHIC as early as January 1996. (Document #75, Plaintiff's response at 9). A review of the deposition testimony submitted in this case reflects only that the reassignment of Randy Basham to South America and Ed McSweeney's assignment to take over the International Division were in the works in January 1996. This undersigned magistrate judge could find no evidence that in that submitted which

reflected any plans by anyone at BHIC to consolidate the support and estimating sections of the International Division until at least late May 1996. (See Basham Depo. at 49; McSweeney Affidavit ¶¶ 3,5,11,12; Rein Affidavit ¶ 2).

According to plaintiff, other eveidence of discrimination by BHIC includes her claim that there is evidence that shows that BHIC was searching for a male estimator about two weeks after her termination. This evidence is her own testimony that, in the weeks following her termination, she was contacted by Jim Goodwin of Technical Construction Services who told her that David Marchman, a professor at the University of Southern Mississippi and a BHIC employee during the summers of 1994-1996, had told him that Ed McSweeney of BHIC was looking for estimators who were male and around 35. (Jackes Depo. at 154).

Plaintiff also asserts that further evidence of discrimination is found in the fact that she was the only permanent BHIC employee laid off in 1996 and that additional male estimators were hired at BHIC just before and after her termination. She identifies these individuals as Lamar Phillips, Ricky Aldape, Will Hereford, John Butler, and Dustin Kennedy.

According to plaintiff, she was told that Phillips, who was hired in March 1996, would be taking over her estimating duties. Plaintiff states that she was more qualified than Phillips based on her overall experience and her experience with international projects. Plaintiff states that Will Hereford and Ricky Aldape also were hired as estimators just prior to her termination. (Id. at 147-48, 157-58, 230). John Butler and Dustin Kennedy were contract employees whom she states were hired after she was terminated to help with the estimating

in the International Division, even though that division was allegedly downsizing and restructuring. BHIC denies this assertion, and its explanation for the hiring of these employees is outlined below.

Ms. Jackes also claims that, if defendant felt the need to eliminate one permanent employee, it could have hired her as a contract employee. However, she alleges that she was never considered for such a position despite the fact that, after her termination, the defendant hired a number of contract employees to work on international projects. As an example she cites employee David Corley. According to plaintiff, he began work for BHIC as a salaried employee and later was converted to a contract employee. However, Corley was not a structural architectural estimator, and the evidence reflects that BHIC never hired another one after plaintiff's termination. (McSweeney Affidavit ¶ 8, Jackes Depo. at 156).

In regard to defendant's assertion that her termination was due to downsizing and restructuring, plaintiff claims that there were few, if any, personnel or employment actions to reflect such an occurrence. She states that Randy Basham and herself were the only permanent employees to leave the International Support group during this period of downsizing and Basham was offered another position.[1]

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[1] Plaintiff avoids the fact that estimator John Dill was terminated on the same day as herself by differentiating between "contract" employees (Dill) and "permanent" employees (herself). This seems to the undersigned magistrate judge to be a distinction without meaning. Downsizing occurs whenever a company cuts personnel. Whether an employee is "permanent" or "contract" is irrelevant to the issue of whether BHIC was really involved in a downsizing when it terminated plaintiff and others.

Plaintiff also alleges that between June 1996 and February 1997, BHIC increased its employees by 150. In addition, she states that 20 contract employees were hired on international jobs from June 1996 to August 1998, none of which were women. BHIC acknowledges that it did add some employees but notes that most were hired by the Domestic Division, not the International Division. BHIC states that it has not hired a structural architectural estimator since plaintiff's termination and that the first time anyone was hired into the International Division as a permanent employee after plaintiff's termination was in January 1998 when BHIC hired two junior engineers. (McSweeney Affidavit). Likewise, the earliest date after her termination that BHIC hired a contract employee to work in the International Division was in early 1997. (Vines Depo. at 56-57). None of those hired worked as an architectural structural estimator.

Plaintiff offers further proof of discrimination by claiming that, though BHIC stated that it was terminating her for lack of work, the company was involved in numerous projects and bids just prior to and immediately after her termination. She cites a project in Qatar, and a mall project and an opera hose in Kuala Lumpur as projects being worked on in May-June of 1996. She states that, following her termination, BHIC worked on bids for a sewer/pipeline in Turkey, an airbase in Iceland, a U. S. Embassy in Slovakia, a sewer project in Gesia, a renovation project in New Delhi, India, and a project in Rome, Italy. She also states that BHIC was working on a bid for the embassy in Moscow both before and after her termination; however the record reflects

that BHIC was notified that it did not get that job on May 2, 1996.

Plaintiff states that she was working on projects in Hong Kong and Egypt at the time she was terminated. She describes her workload as heavy and claims that the estimators were so busy that estimators in the Domestic Division and other locations around the world were brought in on several international projects, such as Tel Aviv, Hong Kong, and Kuala Lumpur, after the plaintiff's termination to assist in the work.

According to plaintiff, the environment at BHIC was decidedly hostile against women and older employees. She cites women being referred to as "girl", a great deal of "dirty" joking and bad language among the men, and a reference to an employee who was commonly called "the old man." She also asserts that BHIC refused to hire husband-wife tile-setters because the "wife would be coming along even though the wife was a qualified worker." (Boyer Depo. at 53). However, when asked why BHIC wouldn't hire husband-wife teams, she stated that "[a] couple of them were past employees that they decided they did not want to hire for whatever reason." (Id.)

The plaintiff also claims that the defendant made misrepresentations concerning the classifications of women considered to be employed in "professional" positions and concerning the credentials and qualifications of certain employees in the International Division. In particular, she claims that David Corley was misrepresented as being a mechanical engineer when he was not, and that the credentials and qualifications of Lamar Phillips were mischaracterized
in an attempt by BHIC to justify hiring him.

Discrimination in Terms of Employment

Plaintiff also claims that she was excluded from working on projects and bids within the International Division because of her age and sex. As an example, she cites the Moscow project. (Jackes Depo. at 168-69). ¶ 13). He told her she would be participating in the Moscow project in due time.

Plaintiff asserts that she also was excluded from working on the Moscow Embassy project by Ed McSweeney in January 1996 and by Jon Green in March 1996. She states that in March 1996, McSweeney asked her to do a quantity survey on furniture and some other items for the Moscow project and told her that she needed to do so quickly. (Jackes Depo. at 168-169). She sent a memorandum to project manager Jon Green requesting information on specific areas for which she was to provide quantities and pricing. She stated that when she did not get information she needed concerning the project from Jon Green by the next day, she went to the building where the work on the project was being done but was told to leave the premises by Jon Green, ostenibly because she did not have the proper "MEBCO" security clearance. (Id.at 37-38, 225-227; Green Depo. at 19, 57-58). Green testified that he was not aware that plaintiff had completed the process and asked her to leave the area. However, Ramona Boyer, has testified for plaintiff that Jon Green had signed the papers to obtain plaintiff's clearance on the same morning she was sent away and that, when the clearance arrived, later that same day, Boyer entered plaintiff's name on a computerized list of persons with clearances. (Boyer Depo. at 19-20). However, she did not

know whether Green had received this memorandum by the time he excluded the plaintiff. (Id. At 22-26). Plaintiff claims that she was excluded from this project because of her sex and that she was the only estimator in the International Division who did not work on the Moscow project. (Jackes Depo. at 128, 170). However, the evidence submitted reflects that John Dill also did not work on this project.[2] (Id. at 139).

Plaintiff also alleges that other employees, such as Randy Basham and Lamar Phillips, were permitted to work on the Moscow proposal even though they did not have appropriate security clearances. In fact, she claims that she was the only estimator who did not work on the project even though she was the only one with appropriate clearance. However, the testimony is uncontroverted that a MEBCO security clearance was not required for all work on the Moscow project, and there is no evidence that any estimator worked without necessary clearances. (Id. At 31-32).

Plaintiff also asserts that she was given only limited involvement in the TCER project in 1992-94 and claims that she was not informed of some of the staff meetings regarding the Egypt project in March or April of 1996. However, she testified that she does not know why she was so excluded and asserts that it must be because she is female and the only estimator she knows who was not invited to the meetings. (Id. at 136-37). She provides no other evidence in support of these claims. Plaintiff also claims she was denied access to computer training courses and had difficulty

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[2] Presumably plaintiff means she was the only "permanent" employee that did not work on the Moscow project, sice Dill was a contract employee.

getting her proposals out. Plaintiff states that her general treatment at BHIC is evidence of the discriminatory atmosphere there.

In addition, plaintiff complains that she was the only International Estimator who was not allowed to travel to international sites. As evidence, she cites numerous instances of travel by Lamar Phillips, Jon Green, David Corley, David Robbins, and Pierre LeBeau. (Id. At 111). Though admitting that John Dill also did not travel overseas, she asserts that this is evidence of sex discrimination because she was the only permanent (i.e., non-contract) employee who was not allowed to travel to international job sites. However, plaintiff admits she was able to perform her estimating work without international travel. (Id. At 109).

According to plaintiff, her initial security clearance (not MEBCO clearance) was held up as a result of sex discrimination. However, she admits that this occurred in 1992 when she worked at HIC, that she eventually received the clearance while working at HIC, and that she held a (non-MEBCO) clearance the entire time she worked at BHIC. (Id. At 108).

According to plaintiff, another example of discrimination in the terms of her employment is seen in the fact that she was paid less than her male counterparts. She claims she should have been paid as much as Pierre LeBeau, David Corley, and Lamar Phillips. (Id.at 46,48). The defendant asserts that plaintiff was not discriminated against on the basis of sex though she was paid less than other male employees of BHIC. (See id. At 116). Testimony offered by the defendant reflects that each of these men possessed a college degree. In addition, the defendant believed that each had more estimating experience than plaintiff and were performing duties that she was not

qualified to do. (Harbert Affidavit ¶¶4-5,9-14, Exh. 1,2,3).

LeBeau is an electrical engineer who holds an engineering degree from the University of Alabama and has been employed as an electrical estimator with BHIC since July 1992. Prior to that, he worked for four years as an electrical estimator for HIC. He also had five years of experience as an electrical engineer with another company.

Corley was a mechanical estimator with a degree in Building Sciences from Auburn University. He also had worked as a mechanical estimator for BHIC since July 1992. Prior to that he had worked for three years as a mechanical engineer for HIC and nine years with another construction company as an estimator and project manager and then as vice president of estimating.

Lamar Phillips was an estimator/scheduler with a degree in Building Sciences from Auburn University. He also had over seventeen years' experience in estimating, scheduling, and project management.

As noted above, plaintiff completed less than a year at Mississippi College for Women. She has never been a lead estimator, lead scheduler or project manager and prior to her employment with HIC and BHIC, plaintiff was estimator on only three jobs with the Daniel Company and on two projects for W. A. Marable Company. In plaintiff's own testimony, she admits that she had very little experience as a scheduler, her training as an estimator was solely on-the-job training, and she did no regular estimating work until she came to work at BHIC. Billy Harbert, President of BHIC, stated, by sworn affidavit, that he did not believe that the plaintiff was qualified for the

job for which Phillips was hired. (Harbert Affidavit ¶ 9).

In addition to being paid less than male estimators in the International Division, plaintiff also complains that she was paid less than Roger Morse an estimator in the Domestic Division. However, the uncontroverted testimony is that Roger Morse's pay was determined by Jim Rein who had no influence on the pay of estimators in the International Division. In addition, Morse also holds a degree in Building Sciences and was employed as a project engineer/estimator for HIC from 1985 to 1993, and for BHIC since then. He also was assigned duties as lead estimator in 1994.

In addition, plaintiff asserts that she was discriminated against in regard to vacation time, citing an instance where she claims that she was forced to take a vacation day because of bad weather while male employees were not. She also states that Green and Corley were allowed to go on a fishing trip with a vendor without taking vacation days. She also claims she was unfairly reprimanded for failing to attach a certain item to a memo to Ed McSweeney and was the only estimator given a cubicle, as opposed to an office, when BHIC was moving its offices to another building.

According to plaintiff, Green had problems with women at work and was reprimanded for spending too much time around a female employee named Sandra Pate. She states that Green was counseled and Pate was terminated. In addition, she claims that Green called her a "bitch" and sexually assaulted her. (Jackes Depo. at 88, 178). However, her deposition testimony reflects only that she alleged that Randy Basham made what she considered to be an inappropriate sexual advance on one

occasion before either was employed by BHIC. There is no evidence of an assualt by Green. Plaintiff claims that she complained to her supervisor, Randy Basham, about Green calling her a "bitch," but no corrective action was taken. (Id. At 68).

Plaintiff asserts that she was not aware of any sexual harressment policy preventing the treatment she received while at BHIC and only recalls seeing the EEOC poster in the break room. She claims that she filed her EEOC claim on November 22, 1996, asserting that she had been harassed and discriminated against in terms of her employment and claiming that she was eventually terminated because of her sex and her age. According to plaintiff, this discriminatory continued up to the date of her termination.

Age Discrimination Claim

Testimony presented by the defendant reflects that the plaintiff's supervisor until early 1996 was Randy Basham. However, at the time of her termination, plaintiff was supervised by Ed McSweeney. (McSweeney Depo. at 37). In January 1996, Basham was removed from his position as vice president over the support area of the International Division and Ed McSweeney was made executive vice president over the International Division. (Harbert Affidavit ¶¶6,7). However, McSweeney did not begin to work regularly at BHIC headquarters in Birmingham until May 1996. (McSweeney Affidavit ¶3). At that time the International Division consisted of an estimating group and a support group. (McSweeney Depo. at 10-11, 15-16; Jackes Depo. at 129). The support group consisted of

mechanical estimator David Corley, electrical estimator Pierre LeBeau, mechanical estimator John Dill, and the plaintiff, a structural architectural estimator. (McSweeney Depo. at 12,15; Jackes Depo. at 43, 45, 129). The estimating group, which maintained an office in a building separate from the support group, consisted of vice president Alf Hill, senior estimator Eric Agnew and estimator/scheduler Lamar Phillips. (Jackes Depo. at 129-30; McSweeney Depo. at 10; McSweeney Affidavit ¶ 4).

In the spring of 1996, BHIC had been working on a bid to build the U. S. Embassy in Moscow. On May 2, 1996, BHIC learned that its bid had not been accepted. (Harbert Affidavit ¶ 8). At the same time, BHIC's level of international business was being affected by a decline in U. S. government funded projects overseas. Ed McSweeney testified that, based on these events and a desire to increase profitability, he decided to restructure the International Division by consolidating the estimating and support groups and eliminating the positions of the plaintiff and of the contract employee John Dill. (McSweeney Affidavit ¶ 5, 7; McSweeney Depo. at 37, 39-40).

According to McSweeney, his decision to eliminate plaintiff's position was due to the decrease in need for project support functions for embassy architectural work and the increasingly sporadic nature of international jobs requiring civil take-off work. McSweeney testified that he decided that plaintiff's project support activities could be performed more economically at each work site and that the civil take-off work could be absorbed by other estimators, the use of subcontractors on an aas-needed basis, or BHIC's Malaysia office.

McSweeney informed plaintiff on June 28, 1996, that she was being terminated due to downsizsing, restructuring, and a lack of work. Human Resources Manager John Vines was also present, although he did not participate in the decision to terminate plaintiff. (Jackes Depo. at 158, 195-96; McSweeney Depo. at 39-40). Based on the diminishing overseas estimating work, McSweeney also concluded that one mechanical estimator was needed in the International Division. As a result, John Dill also was terminated on June 28, 1996. (Jackes Depo. at 45; McSweeney Affidavit ¶ 7).

At the time of her termination, plaintiff was 45 years old. Among the other non-clerical employees not terminated, Alf Hill was 63, David Corley was 42, Lamar Phillips was 40, and Eric Agnew was 45. (McSweeney Affidavit ¶10).

In response to plaintiff's claim that evidence of age discrimination can be found in the fact that BHIC hired two younger estimators in the months prior to plaintiff's termination, the defendant provided testimony which reflects that these two estimators, Ricky Aldape and Will Hereford, were hired by BHIC's Domestic Division by Jim Rein, president of that division. (Rein Affidavit ¶ 2). The undeisputed testimony reflects that Rein had no knowledge of McSweeney's plans to restructure the International Division or to terminate plaintiff. (Id. At ¶ 3). In addition, McSweeney has stated that, at the time Rein hired Hereford and Aldape, McSweeney had not yet made the decision to terminate plaintiff. (McSweeney Affidavit ¶ 3).

According to the defendant, Lamar Phillips was hired in March 1996, as an estimator/scheduler to fill a void left when senior estimator David Robbins resigned from

BHIC in the fall of 1995. (Harbert Affidavit ¶ 2,3). He was not hired as an structural architectural estimator. (Id. At ¶¶ 3,5). According to the testimony of the defendant, while the plaintiff was primarily responsible for estimating furniture and the architectural aspects of projects, Phillips was responsible for preparing complete estimates for projects, preparing bid documents and producing the construction schedule for international projects. (Jackes Depo. at 212-13; Phillips Depo. at 26-28; Harbert Affidavit ¶5).

At the time he was hired by BHIC, Phillips had over 17 years of experience in construction scheduling, project management, and estimating. (Harbert Affidavit ¶ 4). He had worked for Harbert International as a senior estimator and in project management services and holds a degree in Building Sciences from Auburn University. (Id.) This is in contrast to plaintiff's lack of a college degree and paucity of experience in scheduling and estimating, outside of the limited area of the work she performed for BHIC. Plaintiff states in her deposition that she does not have a college degree and, in fact, completed less than a year at Mississippe College for Women. (Jackes Depo. at 43-44). Unlike Phillips, she has never been a lead estimator, lead scheduler, or project manager. (Id.at 54).

Legal Analysis

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, becausse of such individual's race, color, religion, sex, or

national origin." 42 U.S.C. § 2000e-2(s)(1). Likewise, it is also unlawful to discriminate against a person regarding the terms and conditions of employment based on age. 29 U.S.C. § 623. Defendant asserts that there is no direct evidence of discrimination and that, therefore, plaintiff must make out a prima facie case of discrimination based on circumstantial evidence. A review by the court of all evidence in this case leads it to conclude that this is correct.

In evaluating Title VII claims based on circumstantial evidence, the court uses the framework established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d. 668 (1973), and Texas Department of Community Affairs v. Burdine,450 U. S. 248, 101 S. Ct. 1089, 67 L. Ed.2d. 207 (1981), and by the Eleventh Circuit in Willis v. Conopco, Inc.,108 F.3d 282,284-85 (11th Cir. 1997). Under that framework, the plaintiff has the initial burden of establishing a prima facia case of discrimination by a preponderance of the evidence. McDonnell Douglas, 411 U. S. at 802, 93 S.Ct. at 1824; Burdine, 450 U. S. at 253-54 & n.6,101 S.Ct. at 1093-94 & n. 6. Once a prima facia case has been established, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the challenged employment action. McDonnell Douglas, 411 U. S. at 802, 93 S.Ct. at 1824; Burdine, 450 U. S. at 254, 101 S.Ct. at 1094. If the defendant carries its burden of producing legitimate, non-discriminatory reason for its decision, the plaintiff is accorded the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision, "either directly by persuading the court that a discriminatory

reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U. S. at 256, 101 S.Ct. at 1095. The plaintiff at all times retains the ultimate burden of persuading the trier of fact that the employer discriminated against the plaintiff. Id. At 253, 101 S.Ct. at 1093.

The "Factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." Burdine, supra, at 253, 101 S.Ct. at 1093. In other words, is "the employer....treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U. S. 567, 577, 98 S.Ct. 2943,2949, 57 L.Ed.2d 957 (1978), quoting Int'l. Brotherhood of Teamsters v. United States,431 U. S. 324, 335, n. 15, 97 S.Ct. 1843, 1854, n. 15, 52 L.Ed.2d 396 (1977). The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," Furnco, supra, 438 U. S. at 577, 98 S.Ct. at 2949. Where the defendant has done everything that could be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." Burdine, supra, 450 U. S. 253, 101 S.Ct. at 1093

U. S. Postal Service Bd. Of Governors v. Aikens, 460 U. S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d. 403 (1983).

I. Age Discrimination Claim

Plaintiff claims that she was terminated because of her age. This circuit has adopted a variation of the test articulated by the Supreme Court for Title VII claims in McDonnell Douglas v. Green, supra, for cases arising under the ADEA. Mitchell v. Worldwide Underwriters Ins. Co., 967 F.2d.565,566 (11th Cir. (1992). In order to make out a prima facie case of an ADEA violation, the plaintiff must show that she (1) was a member of the protected age group, (2) was subject to adverse employment action, (3) was qualified to do the job, and (4) was replaced by a younger individual. These criteria are slightly different in both a reduction-in-force case and where a position is eliminated in its entirety; in these instances, the plaintiff establishes a prima facie case by demonstrating (1) that she was in a protected age group and was adversely affected by an employment decision, (2) that she was qualified for her current position or to resume another position at the time of discharge, and (3) evidence by which a fact finder reasonably could conclude that the employer intended to discriminate on the basis of age in reaching that decision. Williams v. Vitro Services Corp., 144 F.3d. 1438 (11th Cir. 1998) (quoting Benson v. Tocco, Inc., 113 F.3d 1203, 1207-08 (11th Cir. 1997)); Mitchell v. USBI Company, __F.3d__, 1999 WL 680116 (11th Cir. September 1, 1999).

It is undisputed that plaintiff was a member of the protected age group at the time of her termination. Likewise, her termination is an adverse job action. There has been no claim that plaintiff was not qualified for the position of structural architectural estimator at the time of her discharge. However, the evidence is

clear that plaintiff's position as structural architectural estimator was eliminated in its entirety. No structural architectural estimator has been hired by BHIC's International Division since plaintiff was terrminated. Thus, the questions remaining are whether she was qualified to assume another position and/or whether there is evidence by which a fact-finder could conclude that BHIC intended to discriminate on the basis of age when it terminated plaintiff and/or eliminated her position.

Plaintiff claims that BHIC terminated her because of her age based on two events. One such event is the fact that BHIC hired Lamar Phillips, Will Hereford, and Ricky Aldape several months prior to her termination. All are younger than plaintiff, though Phillips is also over 40 years old and only five years younger than plaintiff. She asserts, in effect, that, if her position was to be eliminated, then there was also no need to hire these estimators and, also, that she is as qualified as Phillips and could do his job. However, the evidence submitted reflects that the decision to consolidate the support and estimating sections of the International Division and to, thus, eliminate plaintiff's position, did not occur until after May 22, 1996 the date on which Mike McSweeney assumed actual control of the International Division. Therefore, none of these positions were available at the time of plaintiff's termination. The fact that positions for which plaintiff claims to have been qualified were available prior of subsequent to her termination is not evidence of discrimination. See Earley v. Champion International Corp., 907 F.2d 1077, 1083 (11th Cir. 1990). In addition, Hereford and Aldape were hired by Jim Rein to work in the Domestic Division. He

was not involved in the decision to restructure the International Division nor to terminate plaintiff. Likewise, McSweeney was not involved in the hiring of Hereford and Aldape. In fact, there is no evidence that he was even aware that they were hired.

The defendant asserts that, even if the court were to assume that plaintiff was "replaced" by Phillips, rather that the subject of a reduction in force, she was not replaced by someone "substantially younger." However, she was replaced by someone who was, in fact, younger than herself, and this can be sufficient, when considered in conjunction with all the evidence, to establish a prima facie case. See Goldstein v. Manhattan Industries, Inc., 758,F2d 1435,1443 (11th Cir. 1985) (whether a prima facie case of age discrimination has been made out is fact specific and the age differential has been made out is fact specific and the age differential does not, in and of itself, determine the outcome, a narrow differential may be sufficient if there is other proof to support it). Nevertheless, whether plaintiff has established this element of her prima facie case is irrelevant because the undersigned magistrate judge concludes that there is no evidence that plaintiff was, in fact, replaced. Her specific job was that of structural architectural estimator. That position was eliminated. The evidence submitted reflects that the position held by Lamar Phillips is in no way equivalent to plaintiff's position. His job description and duties require that he perform tasks for which plaintiff is unqualified, including preparing complete job estimates and designing and overseeing construction scheduling. In addition, as noted above, despite plaintiff's claim to the contrary, Phillips' education and

experience are clearly far superior to plaintiff's. In light of this evidence, the fact that he may have absorbed some of plaintiff's duties after her termination is insufficient to establish a prima facie case of discriminatory replacement. In short, he could do her job and his but she could not do his job and her own. See Daniels v. Westinghouse Corp., 772 F. Supp. 1278, 1282, n. 2 (N.D.Ga. 1990), aff'd, 994 F.2d 828 (11th Cir. 1991). The 11th Circuit Court of Appeals admonishes district courts not to second-guess a company's legitimate assessment of whether an employee is qualified for a certain position. See Mitchell v. USBI Co., supra, and cases cited therein.

The only other evidence offered by plaintiff as evidence that the defendant terminated her based on her age is her claim that, after she was terminated, Ed McSweeney was looking for a 35-year-old male structural architectural estimator. However, the evidence of this alleged event is based on plaintiff's assertion that Jim Goodwin told her that David Marchman told him that Ed McSweeney wanted Marchman to find a 35-year-old estimator. At best, this is double hearsay. Under federal rules, "[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combines statements conforms with an exception to the hearsay rule provided in these rules." Fed.R.Evid. 805; see United States v. Pendas-Martinez, 845 F.2d 938,942-43 (11th Cir. 1988) (both levels of hearsay must be excepted from the hearsay rule.) See also Zaben v. Air Products & Chemicals, Inc., 129 F.3d 1453, 1456-57 (11th Cir. 1997) (employee's testimony that supervisors told him that higher officials wanted to get rid of older employees fell outside hearsay exception for statement by party's agent or servant concerning matter

within scope of agency or employment). Even assuming that there is a basis for admitting the statement alleged to have been made by McSweeney to Marchman as an admission of a party opponent, there is no basis for admitting Marchman's statement to Goodwin or Goodwin's statement to the plaintiff. Therefore, this testimony is inadmissable. Furthermore, Marchman, Goodwin and McSweeney all have denied that such a conversation ever took place, and plaintiff has no evidence to dispute their testimony. (Marchman Depo. at 31, 47, 79-80; Goodwin Depo. at 21-22; McSweeney Depo. at 93). Even assuming Goodwin made an inconsistent statement to plaintiff regarding whether this conversation actually took place, such is also irrelevant hearsay.

The end result is that there exists no substantial evidence that plaintiff was qualified for an existing position at the time of her termination[3] or that BHIC intended to discriminate against plaintiff based on her age when it decided to eliminate her position and terminate her employment. Therefore, she has failed to make out a prima facie case of age discrimination.

II. Sex Discrimination Claim

In addition to her claim of age discrimination, plaintiff also claims that she was subjected to sex discrimination. However, much of her evidence of discrimination is based on speculation rather than facts. For instance, plaintiff alleges that Jon Green and Ed

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[3] A review of the testimony of Ramona Boyer does not support a finding that there were any structural architectural positions open at the time of plaintiff's termination.

McSweeney did not want a female estimator in the International Division. However, her only evidence of this is the conversation outlined above wherein she claims to have been told by Jim Goodwin that Robert Marchman had told him that Ed McSweeney was looking for a 35-year-old male estimator after plaintiff was terminated. As discussed above, this "evidence" is compounded hearsay the occurrence of which the parties involved deny. In addition, Jon Green was not involved in the decision to terminate plaintiff, and his actions would not be probative of discriminatory intent.[4]

As also discussed above, the evidence, even when reviewed in the light most favorable to the plaintiff, does not support the inference that she was replaced by Lamar Phillips. Though Phillips may have assumed some of her duties after plaintiff's termination, he clearly had additional duties which he performed and which plaintiff either lacked significant experience performing or was not qualified to perform. (See Phillips Depo. at 25-31).

Likewise, there is no evidence that the decision to restructure the International Division was made until after Lamar Phillips

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[4] Plaintiff has not alleged that she was subjected to a sexually hostile work environment, only that BHIC terminated her because she was female. Thus, the inquiry is "whether the defendant intentionally discriminated against plaintiff." *U. S. Postal Service Bd. Of Governors v. Aikens*, 460 U. S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (citations omitted). Therefore, any actions by Green, as a non-decision maker, are irrelevant. *See Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987) (company vice president's statement reflecting age bias did not present a genuine issue of material fact as to discriminatory intent when he played no part in the decision to terminate plaintiff and had no knowledge of decision-making process).

was hired by BHIC. Plaintiff's claim that Randy Basham testified that he heard that the company would be downsizing as early as January 1996 is a mis-statement of the evidence. The only "restructuring" of which Basham was ware in January 1996 was that he was moving to the South American Division and Ed McSweeney was taking over the International Division. (See Basham Depo. at 49).

Despite plaintiff's claim to the contrary, there is no evidence that Randy Basham was involved in her termination. Whether she reported to him on her last day in the office is irrelevant. There is no evidence that he had any input regarding her termination. Therefore, even assuming he made the remark attributed to him by the plaintiff, it is not evidence of discriminatory animus by the decision-makers at BHIC in terminating plaintiff.

In order to constitute direct evidence of discrimination, a statement must relate to the motivation of the decision-maker responsible for the contested decision. See Cheek v. Peabody Coal Co., 97 F.3d 200, 203 (7th Cir. 1996) (when there is a lack of evidence that suggests a nexus between the remarks and the contested employment actions, the remarks do not suffice as direct evidence of discrimination to support Title VII claim), and Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1266 (7th Cir.1993) ("We have held that such remarks, when unrelated to the decision process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decision maker."), cert. denied, 511 U. S. 1005, 114 S.Ct. 1372, 128 L.Ed.2d 48 (1994). See also Mitchell v. USBI Co., supra (comments by

non-decision makers do not raise an inference of discrimination); Mauter, supra. However, Basham's remark may be relevant to plaintiff's claim that she was paid less than male estimators. The remark is discussed, in that context, below.

Plaintiff also claims that the fact that she was the only estimator terminated and that the remaining estimators were all male somehow raises an inference of sex discrimination. While statistical evidence may provide circumstantial proof of discrimination, here, the entire pool of estimators in the International Division consisted of plaintiff, Corley, LeBeau, Dill and Phillips. While there is no numerical cutoff point for statistical significance, the smaller the sample size, the greater the likelihood that the under-representation reflects chance rather than discriminatory practices. Williams v. Tallahassee Motor Co., 607 F.2d 689, 693 (5th Cir.1979).[5] In Ochoa v. Monsanto Co., 473 F.2d 318,320 (5th Cir. 1973), for example, the court held that because of the smallness of the numbers involved, the district court was not compelled to set in train the usual presumptions. Courts have suggested on many other occasions that the "small universe" to which statistics relate may preclude significant comparisons. See, e. g., Mayor of Philadelphia v. Educational Equality League, 415 U. S. 605, 621, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974) (under-representation of blacks on 13-member panel); Adams v. Reed, 567 F.2d 1283, 1287 (5th Cir. 1978); Robinson v. City of Dallas, 514

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[5] *In Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

F.2d 1271, 1273 (5th Cir. 1975); Cupples v. Transport Insurance Co., 371 F.Supp. 146, 149 n.1 (N.D.Tex.), aff'd, 498 F.2d 1091 (5th Cir. 1974) (small number of females less probative in a company of only 90 employees than in larger company).

Also undermining this assertion is the fact that plaintiff was the only structural architectural estimator in the International Division. BHIC decided that her duties could be handled by others. This is a business decision the validity of which is borne out of the fact that BHIC has not found it necessary to re-establish that position since the time of the plaintiff's termination. Furthermore, while her duties were obsorbed by others, she was not qualified to obsorb the duties of any of the other estimators in the International Division. Plaintiff is not an electrical engineer nor a mechanical engineer nor does she hold a college degree in building sciences. She also has only limited experience in scheduling and putting together complete project bids compared to Lamar Phillips. See Watkins v. Sverdrup Technology, Inc., 153 F.3d 1308, 1316 (11th Cir. 1998) (in establishing prima facie case, plaintiff must show she was replaced by someone similarly situated).

In addition, plaintiff was not the only estimator terminated by BHIC. In addition to eliminating plaintiff's position, McSweeney decided that the International Division had a need for only one estimator. As a result, John Dill also was terminated on the same day as plaintiff. Plaintiff attempts to differentiate between herself and Dill by pointing out that he was a contract employee. However, this distinction is irrelevant. Dill's position was eliminated for the same reason as was the plaintiff's: a desire by BHIC to downsize and

restructure the International Division. There is simply no significant admissible evidence put forth by plaintiff that reflects that this was not a business decision. The fact that BHIC was still working jobs and soliciting new customers does not mean it had a "booming" international business. It merely means it was attempting to obtain as much international business as possible. Indeed, this court has previously stated that there is insufficient evidence in the deposition testimony to suggest that BHIC's International Division was so busy after plaintiff's termination that it used estimators from its Domestic Division. If anything, the reverse is true; International Division estimators assisted a busy Domestic Division. (See Order entered March 29, 1999, Document #59.)

Plaintiff asserts that it would be improper for the court to consider her claims of sex and age discrimination separately. This may be true; however, because she has failed to establish a prima facie case of either sex or age discrimination, she also has failed to establish any evidence to support her "sex-plus" claim. Much of plaintiff's argument in this area is conclusory. The incidents she points to as factual basis either are not borne out by evidence (e.g., the allegation that there were several positions open in the International Division), involve actions not undertaken by decision-makers, actions which she failed to bring to the attention of management ("dirty joking"), or consist of unsubstantiated double hearsay (the "Marchman" statement).

While the undersigned magistrate judge finds that plaintiff has failed to make out a prima facie case of of sex or age discrimination, even if the existence of a prima facie case is assumed, plaintiff has failed to

show that the reasons for her termination asserted by BHIC were pretext for discrimination. BHIC made a business decision to restructure the International Division. It is irrelevant that plaintiff believes that the restructuring was unnecessary. BHIC decided that it was.
See Combs v. Plantation Patterns, 106 F.3d 1519, 1543 (11th Cir. 1997). ("federal courts do not sit to second-guess the business judgement of employers"), cert. denied sub nom, Combs v. Meadowcraft Company, ___U.S.___,118 S.Ct. 685, 139 L.Ed.2d 632 (1998). Plaintiff's claims that business at BHIC was "booming" when she was terminated is of little value. Plaintiff does not attempt to differentiate between the work performed by the International Division where she worked and the Domestic Division where she did not work. Clearly, there was growth in the Domestic area. (vines Affidavit ¶ 11). Just as clearly, BHIC did not receive the bid for the Moscow embassy, thereby eliminating that job as a source of revenue to BHIC. Furthermore, plaintiff has failed to identify any position in either division that was open and for which she was qualified. The decision to terminate her was logical based on the evidence BHIC has put forth. Plaintiff's opinion that she is as qualified as others not laid off or that she does not believe downsizing was necessary are irrelevant. It is the employer's belief's that are important, not the employee's. Holifield v. Reno, 115 F.3d 1555,1565 (11th Cir. 1997); Mitchell v. USBI Co., supra. Therefore, there is no evidence to support plaintiff's claim of pretext.

III. Discrimination in Terms of Conditions of Employment

Plaintiff's claims that she was discriminated against in the terms and conditions of her employment are also without merit. In addition, these claims are time-barred because she failed to file a timely charge of discrimination with the EEOC. A claimant must file a sex discrimination claim with the EEOC within 180 days after the alleged practice occurred. 42 U.S.C. §2000e-5(e)(1). The plaintiff's EEOC charge was presented at the earliest, on November 22, 1996. Thus, her claims for sex discrimination in the terms and conditions of her employment are time-barred to the extent that the complained-of acts occurred before May 26, 1996.

Plaintiff's claim regarding the delay in receiving her security clearance occurred prior to 1992. Her claim of exclusion from the Moscow Embassy project occurred in January and March 1996; her limited involvement in the TCER project occurred in 1992 and 1994; and her exclusion from meetings relating to some of the Egypt ptojects occurred in March or April 1996. Her claim of discrimination with respect to vacation time, occurred at least a year prior to June 1996.

For plaintiff's claims to be viable when, as here, they occurred outside the 180-day period, she must show that they are a series of closely related acts, one or more of which occurred within the limitation period.

- Where an employee charges an employer with continuously maintaining an illegal practice, he may file a valid charge of discrimination based upon the illegal practice until 180 days after the last occurrence of an instance of that practice. However, where the employer engaged in a

discrete act of discrimination more than 180 days prior to the filing of a charge with the EEOC by the employee, allegations that the discriminatory act continues to adversely affect the employee or that the employer presently refuses to rectify its past violation will not satisfy the requirement of 42 U.S.C. § 2000e-5(e) that the plaintiff file his charge of discrimination within 180 days of the discriminatory act.

Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 658 (11th Cir. 1993). (citation omitted), cert. denied, 513 U.S. 814, 115 S.Ct. 69, 130 L.Ed.2d 24 (1994). Thus, the continuing violation doctrine will not apply here since none of the incidents are related or occurred during the limitations period. The same holds true for the plaintiff's claim regarding international travel. She has not shown that she was denied travel anywhere after May 26, 1996. Therefore, this claim is also time-barred.

Even if these claims were not time-barred, they still fail due to the fact that plaintiff has not shown that these actions were related to her sex and, more importantly, she has not shown that these actions somehow disadvantaged her economically or professionally. She always received favorable job evaluations. Therefore, the failure to travel, delay in receiveing security clearance, and alleged exclusion from meetings about the Egypt project did not affect her ability to complete her job assignments to the satisfaction of her employer. Thus, this claim is without merit.

IV. Pay Claim

Plaintiff claims that she was not paid as well as her male counterpart. However, she fails to provide any true comparators. All the employees to whom she attempts to compare herself had job-related college degrees, more experience and different jobs than the plaintiff. While the plaintiff has not raised and Equal Pay Act claim per se, the provisions of and cases decided under that act are illustrative. The prima facie case under the Equal Pay Act[6] requires that an employee show "an employer pays different wages to employees of opposite sexes 'for equal work on the jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions..'" Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974); Pearce v. Wichita County, City of Wichita Falls, Texas, Hospital Board, 590 F.2d 128, 133 (5th Cir. 1979). The standard for determining whether jobs are equal in terms of skill, effort, and responsibility is high. When Congress enacted the Equal Pay Act, it substituted the word "equal" for "comparable" to show that "the jobs involved must be virtually identical, that is, they would be very much alike or closely related to each other." The restrictions in the act were meant "to apply only to jobs

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[6] The Equal Pay Act provides, in relevant part, that:
No employer ...shall discriminate...between employees on the basis of sex by paying wages to employees...at a rate less than the rate at which he pays wages to employees of the opposite sex...for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions....

29 U.S.C. § 206(d) (1978).

that are substantially identical or equal." Brennan v. City Stores, Inc., 479 F.2d 1256 (5th Cir. 1972), the court stated " [b]y substituting the term 'equal work' for 'comparable work,' which was originally suggested, Congress manifested its intent to narrow the applicability of the Act," Id. at 1258. Congress intended to permit employers wide discretion in evaluating work for pay purposes. Id. Thus, although employees do not have to prove jobs are indentical, they have the heavy burden of proving "substantial identity of job functions." Id. Jackes has failed to provide any true comparators, plaintiff has failed to establish a prima facie case of disparate pay.

She also offers as evidence her allegation that her supervisor in 1995, Randy Basham, made the remark that she "made good money for a woman" when she complained about only getting a 3 percent raise. This remark is, at best, circumstantial evidence of discrimination. "Direct evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption."
Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989);accord Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1558 n. 13 (11th Cir. 1988). "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate,....constitute direct evidence of discrimination." Carter, 870 F.2d at 582. But the evidence at issue here, at most, suggests discrimination,[7] leaving the trier of fact to infer discrimination based on the evidence; by

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[7] While one could infer an intent to discriminate by this remark, it could also be explained as nothing more than an acknowledgement of the existence of the well-documented "glass-ceiling" faced by many professional women.

definition then, the evidence is circumstantial. See Earley, 907 F.2d at 1081-81. While plaintiff may not agree with BHIC's evaluation of her abilities as compared with the others she cites, ashe has failed to demonstrate that the basis for paying her less was made in bad faith. Plaintiff's lack of a college degree and lack of education and experience in the areas of electrical and mechanical engineering, scheduling and bid preparation are all sufficient bases for the decision of BHIC to pay her less than the other estimators. Thus, even assuming this evidence is sufficient to establish a prima facie case of sex-based pay discrimination, plaintiff has failed to show that defendant's assertion that it payed the male estimators more based on what it perceived to be their superior education and experience is pretextual. See Jamerson v. Univ. of Ala. Bd. Of Trustees, 662 F.2d 320, 322-23, (5th Cir. 1981), and Feazell v. Tropicana Products, Inc., 819 F.2d 1036, 1039 (11th Cir. 1987)

CONCLUSION

After careful review of the evidence and the briefs submitted by the parties, the court concludes that the plaintiff has failed to make out a prima facie case of age or sex discrimination, or any combination of the two. She also has failed to make out a prima facie case of discrimination with regard to the terms and conditions of her employment. In addition, she has failed to show that the explanation by BHIC for its actions with regard to plaintiff are pretextual. Therefore, it is RECOMMENDED that defendant's motion for summary judgement be GRANTED and this action be Dismissed with Prejudice.

Notice of Right to Object

The parties are Directed to file any objections to this Report and Recommendation within a period of fifteen (15) days from the date of entry. Any objections filed must specifically identify the findings in the magistrate judge's recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the district court.

Failure to file written objections to the proposed findings and recommendations of the magistrate judge'' report shall bar the party from a de novo determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except on grounds of plain error or manifest injustice. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B 1982). See also Bonner v. Prichard, 661 F.2d 1206 (11th Cir.1981) (en banc), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 14th day of September, 1999.

/s/Harwell G. Davis, III
Harwell G. Davis, III
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

JO ANN G. JACKES,
Plaintiff,

-vs.-

Case No.
CV 97-P

3264-S

BILL HARBERT INT'L CONST. INC.
Defendant.

ENTERED

FINAL JUDGEMENT

OCT.21,1999

On September 14, 199, the magistrate judge's report and recommendation was entered and the parties were allowed fifteen days in which to file objections. On September 29, 1999, plaintiff filed objections to the report and recommendations. On October 14, 1999, defendant filed its response to those objections.

After careful consideration of the record in this case, the magistrate judge's report and recommendation, the plaintiff's objections, and the defendant's response, the court ADOPTS the report of the magistrate judge. The court makes special note of the following conculsions:

(1) The magistrate judge correctly treated (pp. 22-23 of the report) as inadmissible

hearsay the offer of the plaintiff's statement of what she had been told by Jim Goodwin as to what Jim Goodwin had been told by one of the defendant's employees. At a trial plaintiff's testimony regarding this conversation might be admissible to impeach (as an inconsistent statement) Goodwin as a witness, but it would not be admissable substantively for it's truth.

(2) Even if plaintiff's "Third Affidavit"---which, not being filed until October 1, 1999, was struck by the magistrate judge as untimely---were considered, it would only have affected the recitation of evidence with respect to plaintiff's prior work as a project manager. Elimination from the report of findings that plaintiff had never been (or worked as) a project manager would not result in a change of the conclusion that summary judgement in favor of the defendant is warranted.

(3) The magistrate judge correctly evaluated the evidence regarding plaintiff's termination under a "reduction in force" analysis rather than a "replacement" analysis.

(4) The magistrate judge correctly veiwed certain evidence regarding "conditions" of employment or sexist comments as essentially irrelevant with respect to plaintiff's termination claims.

The court ACCEPTS the recommendation that the defendant's motion for summary judgement is GRANTED and this action is hereby DISMISSED WITH PREJUDICE, each party bearing its own costs and atttorney's fees.

This the 18th day of October, 1999.

"s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH DISTRICT

No. 99-14821

D.C. Docket No. 97-03264-CV-P

JO ANN G. JACKES,

Plaintiff-Appellant,

versus

BILL HARBERT INTERNATIONAL
CONSTRUCTION COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of ALabama

(February 2, 2001)

Before TJOFLAT and BIRCH, Circuit Judges
and
VINING*, District Judge.

*Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

We affirm the judgement of the district court based on the thorough Report and Recommendation of Magistrate Judge Harwell G. Davis, III dated 14 September 1999 and the district court Final Judgement of Judge Sam C. Pointer, Jr. Dated 18 October 1999.

AFFIRMED

CERTIFICATE OF SERVICE

I here certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served via U. S. Mail upon the following:

Ms. Jennifer F. Swain
AmSouth Harbert Plaza
1901 6th Avenue North, Suite 2900
Birmingham, Alabama 35203-2618

Clerk
United States Court of Appeals for
the Eleventh Circuit
56 Forsyth Street
Atlanta, Georgis 30303

/s/ Jo Ann G. Jackes
Petitioner